Natural Resource Damages

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Natural Resource Damages

What is it?
Where did it come from?
Who cares? - Trustees - PRPs - EPA - States
NRD Assessments
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Conclusion

What is a Natural Resource?

CERCLA and OPA define natural resources as **"land, fish, wildlife, biota, air, water, groundwater, drinking water supplies and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States ..., any state..., any Indian tribe."** [42 U.S.C. 9607(f)(1) and 33 U.S.C. 2701(20)]

What is a Natural Resource?

Natural resources do not have to be "owned" by the government for a claim to arise. However, only damages for "public injuries" are recoverable: natural resource damage claims cannot be made for private property interests.

How We Got Here: Public Trust Doctrine

A body of law with its roots in English common law which provides that a state's public lands, waters, and living resources are held in trust for the benefit of all the citizens of the state.

How We Got Here: Public Trust Doctrine

The Public Trust Doctrine provides:

- the right of the public to use and enjoy natural resources, and

- the duties and responsibilities of the states to administer and protect such resources, which are the "assets of the trust."

Natural Resource Damages: Statutory Authority

- CERCLA (Superfund), 33 U.S.C. 9607(a)(4)(C)
  (releases of hazardous substances)

- OPA 33 U.S.C. 2702(b)(2)(A) (oil/navigable waters)

- CWA, 33 U.S.C. 1321(0(4)&(5)

- Park System Resources Protection Act, 16 U.S.C.

NRD Statutory Authority

- Marine Protection, Research, and Sanctuaries Act,
  16 U.S.C. 1443 (marine sanctuaries)

- In addition, many states have separate "pre-existing"
  authority within older state law and some have enacted
  specific natural resource damage statutes. Essentially,
  all of this legislation codifies the principles

Who is the Trustee?

CERCLA and OPA state that the president and the governors of each state shall designate officials who may act on behalf of the public as trustees, and Indian tribes may also designate trustees. The president has designated the secretaries of Commerce, Interior, Defense, Energy and Agriculture as federal trustees.

Who is the Trustee?

The National Contingency Plan provides that the secretaries of the departments that manage federally owned lands (federal facilities) are the trustees for those resources located on, over or under the lands. These include the Secretary of Agriculture, Secretary of Defense and Secretary of Energy.

In the states, governors may designate more than

Who is the Trustee?

- Trustees generally have overlapping management
  interests in the same resources: "coextensive
  authority."

- The statutory prohibition against "double recovery"
  requires that trustees coordinate their natural
  resource damage actions as "co-

How do Trustees get the $?

- Sue to obtain compensation from PRPs for NRD
  and costs of assessment/restoration planning; or

- Conduct assessments/restorations in accordance
  with standards specified by the Fed gov and file a
  claim for reimbursement from the Trust Fund
  established under OPA; or

NRI versus NRD

- Natural Resource "Injury" (NRI) means harm, a measurable adverse change, either long or short term, in the chemical or physical quality or viability of the natural resource.

- Natural Resource "Damages" (NRD) is compensation sought by a trustee for the injury to natural resources.

So what is an “Injury”?

- Neither CERCLA nor the OPA define “injury,”
“destruction,” or “loss.”

- DOI Regulations define “injury” as “ a measurable
adverse change, either long- or short-term, in the
chemical or physical quality or the viability of a natural
resource resulting directly or indirectly from exposure to

So how do ya prove an “Injury”?

The DOI regulations allow proof of injury by:

(1) empirical evidence of an adverse change in a particular case, for example, increased death rates among a species, or

(2) reliance on regulatory standards that, in effect, make the presence of a substance above a certain level injury *per se*, for example, exceeding water quality standards or state or federal tolerance

Defenses to a NRD claim:

CERCLA and OPA state there are three "complete" defenses to liability: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party.

CERCLA excludes damages that result from "rendering care, assistance, or advice" in accordance with the NCP. There can be no recovery for natural resource losses that "were specifically identified as irreversible and irretrievable commitments of natural resources in an EIS, or other comparable

Natural Resource Injury (NRI)

- Natural resource injury (NRI) is of increasing importance at DOD sites such as the MMR and South Valley. Wherever a PRP is responsible for remediating contamination of a CERCLA hazardous substance or petroleum, it is possible, if not likely, that some NRI occurred.

Natural Resource “Damages”

- A claim for "damages" to natural resources arises from
  a release of a hazardous substance (or discharge of oil)
  which "injures" a natural resource.

- Damages are the monetary value attributed to the
  injury.

- An "injury" may include the destruction (death) of a

Natural Resource “Damages”

- "Damages" for " injuries" are pursued by natural
  resource trustees to "compensate" the public for the
  "losses" experienced when a public resource is injured.

- Losses include:
  -- the "direct loss" of the resource (e.g. When the
     natural resource is completely destroyed);

So what is the EPA's Role?

EPA is not a Natural Resource Trustee, nor is it authorized to act on behalf of Natural Resource Trustees.

-- EPA shares with Coast Guard responsibility for investigating and responding to contamination

-- Coast Guard has primary responsibility for the coastal zone including all U.S. waters

What is the EPA's Role?

For NRDs, EPA's role is more limited (no superfund, no enforcement actions) and primarily involves notification/coordination with Trustees.

CERCLA requires EPA to Notify Federal Natural Resource Trustees of settlement negotiations with PRPs, if the release of hazardous substances may have resulted in injuries to natural resources under their Trusteeship and Encourage the participation of Federal Trustees in

NRD prima facie case, trustee must show:

(1) the defendant was owner/operator of a facility or a transporter of hazardous substances, or arranged for disposal, treatment, or transport of hazardous substances;

(2) there was a release or threatened release of a hazardous substance; and

(3) there was injury to, destruction of, or loss of natural resources where plaintiff is a trustee. No recovery for NRD where the

Natural Resource Damage Assessment (NRDA)

- The NRDA is the process for:

-- identifying and documenting the extent of the injuries to natural resources;

-- quantifying the injuries and all associated losses suffered by the public; and,

-- selecting the restoration project(s).

Natural Resource Damages Assessment (NRDA)

One of the primary responsibilities of Trustees under both CERCLA and OPA is to assess the extent of injury to a natural resource and determine appropriate ways of restoring and compensating for that injury.

A natural resource damage assessment (NRDA) is the process of collecting, compiling, and analyzing information to make these determinations.

Natural Resource Damages Assessment - Regulations

Trustees have the option of using:

- DOI methodologies, 43 CFR Part 11, or

- Department of Commerce's NOAA. 15 CFR Part 990.

- DOI regulations are to assess NRD under CERCLA,
  while the NOAA methodologies are for NRDAs under

Natural Resource Damages Assessment - Regulations

If a Fed or State Trustee goes into Federal court and sues a PRP for NRD under CERCLA, an assessment under DOI regulations has force & effect of rebuttable presumption

If a Fed, State, or Tribal Trustee sues a PRP for NRD under OPA, an assessment under the NOAA regulations is given a rebuttable presumption

Natural Resource Damages Assessment - Phases

1- The activities that precede the actual assessment.

2- Preparation of an Assessment Plan; (which is subject
to public review and comment), involves PRPs, trustees,
the general public, and other interested parties.

3- Trustee officials conduct the work described in the

NRD Restorations

Natural resource damages are intended to cover past injures, injuries caused by the remedy and any future injury caused by residual contamination; losses beyond any restoration that may be achieved through remediation.

Compensation can take the form of either monetary damages, to be used by trustees to "restore" injured resources, or a commitment from responsible parties to perform actual "restoration projects."

NRD Restorations

- The goal of NRD is **restoration**: to restore the
  resources and services lost to a level that will return
  injured resources to their "baseline" condition:

  -- the physical, biological or chemical condition
  that would have existed if not for the release, &

NRD Restorations

- The injured resource may be "rehabilitated" to
  accomplish restoration. If rehabilitation of the specific
  injured resource is not possible, the equivalent of the
  injured resource may be "acquired" or "replaced" by:

  -- creating new resources or

  -- undertaking activities that will increase

NRD Restorations - Keep in Mind:

- NRD **is** pursued to accomplish restoration
- to make
  the public "whole" again.

- NRD **is not** pursued in order to **penalize** a discharger.

NRD Issues - Integration

To address responsibilities as a trustee, the AF can:

1- tell the field that NRDA must be done, but give no
   further guidance to the field;
2- tell the field that NRDA must be done and that the
   DOI and NOAA regulations may be used in
   determining what must be done;
3- adopt the DOI and NOAA regulations;

NRD Issues - Integration

- 97 AF Tiger Team recommended integration of the the
  NRDA and Installation Restoration Program (IRP)

- JACE has recommended SAF/MIQ issue a policy
  statement along these lines

- ISSUE: So, should we integrate the NRDA process into
  the IRP process that already exists?

NRD Issues - Integration

- Integration by taking NRDA into account during the
  IRP process:

-- Is consistent with DOJ view that NRD are for injuries
    residual to CERCLA remedial actions

-- DOJ suggests damages should be assessed after
   selection of the remedial action has been completed or

NRD Issues - Integration

At hazardous sites, integration through coordination promotes timely and efficient cleanup and restoration by reducing injury, investigative costs and thus, overall NRD liability.

It reduces the potential added expenses and time of a later separate NRD action that could delay full settlement. Integration helps during the site investigation stage by ensuring the collection of data that is

NRD Issues - Integration

Integrating NRI into the IRP process & involving natural resource trustees as early as the feasibility study phase is more likely to result in a determination of no residual NRI and, therefore, no further NRDA is required, by:

1- Establishing a baseline,
2- Conducting an ecological risk assessment that takes
potential NRI into account,
3- Early and regular coordination with other

NRD Issues - Integration

- What (if any) difference is there between a
  CERCLA and a NRD cleanup?

- What if we clean to an MCL but the state wants
  more cleanup, is that legally defensible?

NRD - Funding

CERCLA Sec. 111(c) authorizes using the Fund to pay the cost of (1) assessing natural resources damages and (2) restoring damages natural resources.

However, SARA Sec. 517(c)(1)(A)(ii) provides that amounts appropriated from the Fund may not be used for the costs described in CERCLA Sec. 111(c)(1) and (2) [for NRDA for natural resource restoration]

NRD - Funding

EPA my request assistance from other agencies in evaluating releases/possible responses under Sec. 104. The SARA prohibition leaves intact Sec. 111(c)(3) to use the Fund to notify trustees and to coordinate investigations, assessments, and activities under 104.

Therefore, under CERCLA we cannot use the Fund to pay the costs of NRDA or of natural resources restoration, but the Fund can be used to pay trustee agency costs for

NRD Issues - Funding

- Can we use Environmental Restoration Account (ERA)
  funds for NRD? [CERCLA Sec. 107; Sec. 111]

- DoD in trustee role is obligated to determine dollar
  value of loss and see recovery, and paradoxically as a
  DoD as a PRP may not have the authority to use ERA

NRD Issues - Funding

- DERP could be interpreted more broadly to authorize
  DoD to use ERA funds to replace or acquire the
  equivalent of affected natural resources

  -- Such an interpretation would eliminate the
  inconsistency of DoD being responsible for and
  being authorized to use ERA funds to
  assess natural

NRD Issues - Cases:

- **South Valley**

  -- Large claim by State
  -- Who is the Trustee? (Suit between designated state trustee and state Attorney General)

- **MMR**

  -- Lessons learned

Web Resources:

Some good sources for more information:

- http://aflsa.jag.af.mil

- www.epa.gov/oerrpage/superfund/programs/nrd/faqs.htm

- www.epa.gov/superfund/programs/nrd/index.htm

Conclusion - Discussion

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Thanks!